STATE OF MICHIGAN

COURT OF APPEALS

RICKY HICKS, ROXANNE HICKS, and BRIAN GOODSELL, Plaintiff-Appellees,	UNPUBLISHED February 25, 2014
v	No. 312365 Manistee Circuit Court
AUTO CLUB GROUP INSURANCE COMPANY, Defendant-Appellant.	LC No. 08-013074-CK

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

BOONSTRA, P.J. (*dissenting*).

I respectfully dissent. In my view, the majority contravenes the plain language of MCR 2.403(O) in absolving plaintiffs Ricky Hicks and Brian Goodsell of any liability for actual costs notwithstanding their rejections of the case evaluation award in this matter and the trial court's subsequent judgment, following a non-jury trial, of no cause of action on their respective claims against defendant.

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [MCR 2.403(O)(1).]

The term "verdict" includes "a judgment by the court after a nonjury trial." MCR 2.403(O)(2). A verdict, after any appropriate adjustment, is considered "more favorable" to a plaintiff if it is "more than 10 percent above the evaluation," and it is "more favorable" to a defendant if it is "more than 10 percent below the evaluation." MCR 2.403(O)(3). "If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." *Id*. Further, in determining whether a verdict is more favorable to a party than the case evaluation, MCR 2.403(O)(4) further states, in pertinent part, that "[i]n cases involving multiple parties," the court "shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." *Id*.

Ricky[1] and Goodsell both rejected the case evaluation award in this matter. The action proceeded to verdict via a nonjury trial.[2] Therefore, under the first sentence of MCR 2.403(O)(1), Ricky and Goodsell each would be obligated to pay defendant's actual costs unless the verdict is more favorable to them than the case evaluation (i.e., "more than 10 percent above the evaluation"). However, defendant also rejected the case evaluation award. Consequently, under the second sentence of MCR 2.403(O)(1), defendant is entitled to costs only if the verdict (as to Ricky and Goodsell) is more favorable to defendant than the case evaluation (i.e., "more than 10 percent below the evaluation").

The difficulty in this case is that the case evaluation award simply stated, "$15,000 to Plaintiffs," without identifying a separate award for each of the three named plaintiffs. Yet, the subsequent verdicts treated the claims of each of the three named plaintiffs differently. Ricky received a judgment of no cause of action because it was determined that he, as a named insured, had intentionally misrepresented and concealed material facts with respect to the claim. The trial court expressly found that Ricky had "clearly committed fraud, false swearing on the contents." Goodsell received a judgment of no cause of action in part because he was not a named insured on the policy and testified at trial that he was not seeking damages.[3] The trial court also found that Goodsell was "going to go along with his friend [Ricky]" and that "[i]f [Goodsell] had a claim, I would put him in the same category as Mr. Hicks." The trial court subsequently confirmed at a hearing on the parties' motions for case evaluation sanctions that this characterization (of Goodsell being in the "same category" as Ricky) related to the trial court's findings of fraud and false swearing against Ricky. The trial court found in favor of Roxanne on her claim, and entered an initial judgment in her favor in the amount of $182,534, finding her to be an "innocent coinsured" who was entitled to recover under the policy notwithstanding Ricky's conduct of fraud and false swearing. After two trips to this Court and one to our Michigan Supreme Court, the trial court ultimately entered judgment in favor of Roxanne in the amount of $262,188. It also awarded case evaluation sanctions in favor of Roxanne in the amount of $22,925 plus interest and taxable costs.[4]

Pursuant to MCR 2.403(O), the question on this appeal is whether the no cause verdicts on Ricky's and Goodsell's claims, considered separately, were "more than 10 percent below" the

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[1] To avoid confusion, I will refer to plaintiffs Ricky Hicks and Roxanne Hicks (Ricky's wife) by their first names.

[2] The case proceeded to trial on the claims of all three named plaintiffs, i.e., Ricky, Roxanne, and Goodsell. No aspect of any trial court ruling with respect to Roxanne's claim is at issue on this appeal.

[3] The record reflects that Goodsell was named as a plaintiff because he and Roxanne were the equitable owners of the real property pursuant to a land contract. The record also reflects, however, that Goodsell testified that he at times paid rent to reside at the property, and that he had some personal property at the premises that was consumed in the fire.

[4] Defendant does not challenge the judgment in favor of Roxanne or the award of case evaluation sanctions to her.

case evaluation award. That comparison is complicated by the fact that the case evaluation award was issued jointly, as "$15,000 for Plaintiffs." However, in the context of a comparison of that award with a $0 (no cause) verdict on Ricky's and Goodsell's respective claims, it is apparent that the most favorable interpretation of the case evaluation award, viewed from the perspective of Ricky and Goodsell, would be to interpret it as an award of $0 to each of them (and thus to attribute the full $15,000 award to Roxanne). Mathematically, if the case evaluation award were interpreted to attribute any positive dollar amount to Ricky or Goodsell, the $0 verdict of each of their claims necessarily would be "more than 10 percent below" that case evaluation award. Therefore, Ricky and Goodsell would be obligated to pay actual costs under MCR 2.403(O). However, even construing the case evaluation award in the light most favorable to Ricky and Goodsell, i.e., as awarding $0 to each of them, MCR 2.403(O) still requires that they pay actual costs, because "[i]f the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." *Id*.

The trial court determined nonetheless that neither Ricky nor Goodsell was liable under MCR 2.403(O) for actual costs, and the majority affirms that determination. As to Ricky, the trial court stated:

> I have to agree with Mr. Brakora, if one claim is derivative of another, MCR 2.403(H)(3), if one claim is derivative of another (e.g., a husband-wife) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.
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> And then I go back to – if I look at – if I look at 2.403(O)(4)(a), we get back to the last sentence of that paragraph. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation. So I have to agree with Mr. Brakora.

The trial court thus based its decision regarding Ricky on MCR 2.403(H)(3) and MCR 2.403(O)(4)(a). With regard to MCR 2.403(O)(4)(a), the trial court did not explain how the last sentence of that rule ("However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.") applies here, and the majority does not affirm the trial court's ruling on the basis of that sentence. By referencing "a plaintiff" who obtains an "aggregate verdict," the last sentence of that rule clearly refers to a single plaintiff receiving a verdict against multiple defendants. It does not apply here, where multiple plaintiffs received verdicts on their claims against a single defendant.

The majority instead affirms the trial court's ruling based on MCR 2.403(H)(3), which states:

> If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators. [MCR 2.403(H)(3)].

In invoking this rule, the trial court stated that "the problem is the claim is by definition derivative. The theory upon which *she* prevailed is inherently derivative. *She* prevailed under the innocent spouse doctrine." (Emphasis added.) The trial court thus found *Roxanne's* claim to be derivative of *Ricky's*. In affirming the trial court's ruling in this regard, however, the majority states that "[t]he trial court denied defendant's request on the ground that *Ricky's* claim was derivative of his wife *Roxanne's* claim under MCR 2.403(H)(3) and, thus, must be treated as a single claim." (Emphasis added.) The majority concludes that because "only Roxanne had an insurable interest in the real property, . . . *Ricky's* claim against defendant was a derivative claim." (Emphasis added.)

It is thus apparent, even assuming that one of the Hicks plaintiffs' claims might be derivative of the other's, that there is confusion, as between the trial court and the majority, as to which plaintiff's claim (Roxanne's or Ricky's) would be the derivative one. The trial court concluded that Roxanne's claim was derivative of Ricky's ("[t]he theory upon which she prevailed is inherently derivative. She prevailed under the innocent spouse doctrine."). But the majority, in affirming that ruling, concludes that Ricky's claim was derivative of Roxanne's, because only Roxanne had an insurable interest in the real property.

But apart from this confusion, the fact is that neither Ricky's nor Roxanne's claim was "derivative" of the other within the meaning of MCR 2.403(H)(3). That rule does not state that claims brought by a husband and a wife are by definition "derivative" in nature. It merely identifies a "husband-wife" relationship as a type of relationship that *may* give rise to a derivative claim. Derivative claims in the husband-wife context are loss of consortium, companionship, and society claims. In other words, such claims are claims that are "contingent upon the injured person's recovery of damages" rather than a claim that may be maintained as a "separate, independent cause of action." See *Auto Club Ins Ass'n v Hardiman*, 228 Mich App 470, 474-475; 579 NW2d 115 (1998).

Here, both Ricky and Roxanne were named insureds under the policy. Both submitted a claim to defendant. Both sued defendant. While only Roxanne and Goodsell were owners of the *real* property, both Ricky and Roxanne sought recovery under the insurance policy for *personal* property, as well as the real property. Ricky's claim was rejected based on his fraud and false swearing regarding "the contents" (as opposed to the real property) and Ricky therefore received a judgment of no cause of action. Roxanne ultimately prevailed on her claim (as to *both* the real property and the personal property), notwithstanding Ricky's fraud and false swearing regarding the personal property. Simply put, there is simply nothing "derivative" about either Ricky's claim or Roxanne's claim relative to the other. Ricky and Roxanne each had an independent basis for bringing a claim under the policy and an independent right to bring suit against defendant following its rejection of their claims. Neither spouse's claim was "contingent upon the [other's] recovery of damages"; rather, each had a claim that could be maintained as a "separate, independent cause of action." *Id*.

The majority avoids this result by stating that "[o]n appeal, defendant does not challenge the trial court's conclusion" that Roxanne's claim was "derivative" in nature, "but merely argues that, even if that 'proposition is true, it is irrelevant.'" I must reject that characterization, because defendant clearly stated on appeal that it "does not agree" with the trial court's finding that Roxanne's claim was derivative of Ricky's. The fact that defendant additionally argued that the

finding was "irrelevant" in light of *Brown v Frankenmuth Mut Ins Co*, 187 Mich App 375; 468 NW 2d 243 (1991), in no way undermines defendant's contention that the trial court erred in its derivative claim finding.

I also must reject the majority's treatment of *Brown*, which I find dispositive. In *Brown*, a husband and wife sued the defendant insurer following a fire loss. Prior to trial, a mediation panel[5] returned an evaluation in favor of the plaintiffs jointly. Following a jury trial, the wife prevailed on her claim against the insurer, but the jury rejected the husband's claim, after finding that he had intentionally set, or had consented to, or had knowledge of the setting of, the fire. This Court affirmed an award of mediation sanctions against the husband. *Brown*, 187 Mich App at 386 ("because the jury returned a verdict of no cause of action against Henry Brown, we affirm the award of mediation sanctions against him and in favor of Frankenmuth").

This case is not meaningfully different than *Brown*. The majority concludes otherwise, based on the fact that "only Roxanne had an insurable interest in the real property . . . ; Ricky was not a party to the land contract." However, as noted, Ricky was a named insured under the policy, and the policy covered not only the real property but personal property as well. Roxanne's claim was based on both. Since Ricky had no legal interest in the real property, his claim was based only on the personal property, as to which he was a named insured (and with respect to which he was found to have committed fraud and false swearing). As a named insured relative to the personal property, Ricky had an insurable interest under the policy, separate and apart from Roxanne's. His claim was in no way derivative of Roxanne's. I would therefore find that the trial court erred in failing to award actual costs against Ricky under MCR 2.403(O).[6]

Regarding Goodsell, the trial court declined to award actual costs to defendant (even though it placed Goodsell in the "same category" as Ricky regarding the fraud and false swearing) because it concluded as follows:

> The problem is I can't impose sanction on a party, Mr. Goodsell, who though he may be deserving of having a sanction imposed on him, where he is asking for no relief in the lawsuit. And he asked for no relief in the lawsuit. So I don't know how I can impose a sanction on him in those circumstances.

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[5] At that time, what is now referred to as "case evaluation" under MCR 2.403 was referred to as "mediation."

[6] It bears noting that, on appeal, plaintiffs have offered no contention or argument that either Roxanne's claim or Ricky's was derivative of the other. Counsel for Roxanne, who represented all three plaintiffs in the trial court but who has appeared only on behalf of Roxanne in this Court, takes no such position in his brief on appeal, and expressly declined to take that position or to defend or attempt to explain the trial court's ruling in this regard at oral argument in this Court. Neither Ricky nor Goodsell has even appeared in this Court, either through counsel or otherwise, or presented any argument of any sort, either in briefing or otherwise.

In affirming the trial court's ruling as to Goodsell, the majority similarly states that "Goodsell did not have a claim against defendant for which he was seeking relief. Because Goodsell never asserted any claim against defendant, the case evaluation award could not have included consideration of Goodsell and defendant did not incur attorney fees and costs defending against any theory of liability raised by Goodsell at trial."

In so finding, the majority in my view conflates the question of whether Goodsell had a *proper* basis for filing a lawsuit against defendant, with the question of whether Goodsell in fact *did* so. Without question, Goodsell was a named plaintiff who filed a complaint against defendant that jointly (with the other named plaintiffs) sought monetary damages exceeding $25,000. The three named plaintiffs presented a unified theory of liability, and together specifically sought to recover the value of the destroyed "residence," the value of the destroyed "contents," and "additional living expense attributable to the loss of the residence." Goodsell continued as a named plaintiff throughout the litigation, was represented by counsel at the case evaluation, was one of the "Plaintiffs" who received a case evaluation award jointly in their favor, and proceeded as a named plaintiff through a non-jury trial following which a judgment of no cause of action was entered against him. The trial court itself expressed surprise ("Why is he a plaintiff?) upon learning at trial that Goodsell was not making a claim for his own benefit. It strains credulity in my mind to then conclude that Goodsell "never asserted any claim against defendant" and that "the case evaluation award could not have included consideration of Goodsell." Clearly, he did, and it did.[7]

The fact that Goodsell, during his testimony at trial, disclaimed his previously-asserted claim for damages does not negate the fact that he brought a claim against defendant, received a case evaluation award, and received a judgment of no cause of action following a trial. Far from absolving Goodsell of liability for actual costs under MCR 2.403(O), these facts instead support a finding *for* them. I therefore would also reverse the trial court's denial of actual costs against Goodsell under MCR 2.403(O).

Finally, I would remand this matter to the trial court for a determination of the amount of actual costs to be assessed against Ricky and Goodsell pursuant to MCR 2.403(O). Although the majority cites to this Court's decision in *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517; 664 NW 2d 263 (2003), I find that it not only undermines the majority's conclusion, but that it provides direction as to the determination of actual costs against Ricky and Goodsell. This Court determined in *Ayre* that where multiple plaintiffs bring suit under a unified theory of liability, as is the case here, but are determined to owe actual costs under MCR 2.403(O), those costs should

[7] Although counsel for Roxanne (who in the trial court also represented Goodsell) contended on appeal that Goodsell earlier testified (in his pretrial deposition) that he was not making any claim in this case, the cited deposition testimony instead reflects that Goodsell testified only that he had not filed a claim with the insurance company, not that he was not asserting a claim in the lawsuit. He clearly did the latter. Further, the record reflects that the claim that was submitted to the insurance company by Ricky and Roxanne (before the filing of the lawsuit) identified Goodsell as having an interest in the property that was the subject of the claim.

be calculated by (a) attributing to each rejecting plaintiff an equal share of the actual costs associated with the liability determination; and (b) attributing to each rejecting plaintiff those actual costs associated with their respective damage claims. See *id*. at 523 ("if all the plaintiffs asserted the same theory of liability, the rejecting plaintiff is liable for the attorney fees associated with the defense against that theory of liability. . . . However, . . . [where] damage claims . . . are necessarily as unique as each plaintiff in the cause of action, . . . the rejecting party is only liable for the attorney fees incurred by the defendant in defending against the damages component of that plaintiff's case.") See also *id*. at 524 ("when more than one rejecting plaintiff is liable for a defendant's attorney fees, the attorney fees associated with defending against a single theory of liability would be divided equally between the liable plaintiffs, but each plaintiff would be responsible for the attorney fees associated with defending against their individual damage claims."). The record reflects in this case that a significant portion of the attorney fees incurred by defendant related to the fraud and false swearing issue on which defendant prevailed as to Ricky (and implicitly prevailed as to Goodsell). In my view, those facts and circumstances, as well as the holding of this Court in *Ayre*, should be considered by the trial court on remand in assessing the amount of actual costs that should be assessed against Ricky and Goodsell pursuant to MCR 2.403(O).

For these reasons, I would reverse the trial court's order denying defendant's motion for case evaluation sanctions, pursuant to MCR 2.403(O), against plaintiffs Ricky Hicks and Brian Goodsell, and would remand to the trial court for a determination of the amount of actual costs to be assessed against each, pursuant to that court rule.

/s/ Mark T. Boonstra